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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY WOODS, Defendant and Appellant.	E053768 (Super.Ct.No. RIF10002037) OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed in part as modified; reversed in part.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Marissa Bejarano and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Michael Anthony Woods of assault by a prisoner by means of force likely to produce great bodily injury (count 1, Pen. Code, § 4501).[1] After a bifurcated jury trial thereafter, the jury found true allegations defendant had sustained three prior prison terms (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)). The court sentenced defendant to an indeterminate term of 28 years to life.

Defendant raises five issues on appeal: (1) insufficient evidence supports his conviction for the count 1 offense because the People failed to adduce any evidence that defendant was committed to prison *by an order made according to law*; (2) the trial court deprived defendant of his constitutional rights to due process and a fair trial by instructing the jury with CALCRIM No. 315, which effectively lowered the People's burden of proof; (3) the trial court erred in denying defendant's *Pitchess*[2] motion without conducting an in camera review of the personnel records of the percipient officer witness; (4) the matter must be remanded for resentencing because the jury's true finding on one of the prior strike convictions was not supported by substantial evidence that it qualified as a serious and/or violent offense; and (5) sentence on one of the prior prison terms must be stricken because insufficient evidence reflects that defendant served separate prison sentences deriving from his prior convictions for robbery and possession of a firearm. We agree with defendant's last two contentions and, therefore, reverse the 25-years-to-

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

life indeterminate term imposed. The matter is remanded for further proceedings in the trial court. We further strike the imposition of sentence of one year on one of the prior prison term findings. In all other respects, we affirm the judgment.

DISCUSSION

On April 6, 2009, Correctional Officer Arthur Warren was assigned to dormitory 307 at the California Rehabilitation Center (CRC) in Norco. Officer Warren testified that at approximately 11:25 a.m., he was in his office where he received an "unlock" call over his radio requiring that all inmates return to their respective housing units; the inmates were returning from lunch. There were communal rooms in the dorms where inmates could play cards or watch television; although, some inmates remained in their individual cells where some had their own televisions. When Officer Warren went to lock the door after the inmates' return "[a] riot broke out within the dorm."

Officer Warren initially heard some bumping and knocking sounds coming from within the dorm, which garnered his attention. He secured the door to the dorm, walked down the hallway past his office, and saw fighting within the dorm. Officer Warren pressed his personal alarm, which sounded an alarm throughout the entire institution. He then ordered the inmates in the dorm to cease fighting and get down on the ground; he called in a "code one" on his radio and described what was occurring within the dorm.

Officer Warren was able to see which inmates were actually engaged in the fight; defendant was one of them. He saw defendant "stomping an inmate with his foot up in the upward up-and-down motion onto the inmate's face"; defendant repeated this behavior "a number of times." The victim put his hand up in an attempt to protect himself, but he did not fight back. During the fracas, defendant and the victim were approximately 20 feet in front of Officer Warren; he had a clear view of them. Officer Warren made eye contact with defendant and ordered him to stop. Defendant "looked up at me and then he proceeded with other inmates to run towards the back of the dorm."

Officer Warren moved to the victim and asked if he was all right; the victim did not respond, but was still breathing. The victim was later identified as Farid Khaybulin. No other inmates were kicking or stomping on the victim; however, other inmates were fighting within the dormitory. The victim was White. Defendant and Officer Warren are both Black. Officer Warren knew an inmate named Verjuan Flewelen; Officer Warren testified he did not see Flewelen stomping on the victim's face and that Flewelen and defendant looked nothing alike.

Laura Bauer, a nurse at CRC, responded to the dormitory shortly thereafter. She immediately treated the victim in the dormitory. The victim had blood coming from his nose and mouth. The victim told her he was coming out of the shower when he was stomped upon. Nurse Bauer had him transported to the urgent care area of the prison

where a doctor evaluated him. An ambulance then took the victim outside the prison to a hospital.[3]

On April 6, 2009, Correctional Sergeant Anthony Roman worked for the Investigative Services Unit, which investigated criminal activity within the prison; he responded to the alarm within a minute or two of when it sounded. He "saw [the victim] laying on the floor, bloody . . . look[ing] like he'd been beaten up pretty good." Officer Warren informed Sergeant Roman he had witnessed defendant stomping on the victim's head. Sergeant Roman identified defendant as an inmate of CRC. Sergeant Roman observed another inmate holding a towel to his head; he was covered in blood. Two men had been severely beaten in the melee. Flewelen was identified as someone who may have been involved; he was deemed a person of interest in the investigation. The next day Flewelen made a statement to someone that his foot hurt; he was discovered to have injuries.

Correctional Officer Gilbert Cortez, who was also assigned to the Investigative Services Unit, also responded to dormitory 307 on April 6, 2009, within a couple minutes of the alarm. Flewelen became a person of interest in his investigation, because Officer Cortez received information the next day that Flewelen had sought medical care for a hurt ankle or foot. None of the inmates, including the victim, were cooperative in the investigation of the incident.

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[3] At this point the People rested their case; defendant moved, without argument, for dismissal pursuant to section 1118.1, which the court denied.

The parties stipulated that Salisha Peters, a registered nurse at CRC, examined Flewelen on April 6, 2009, at approximately 9:00 p.m. During that examination, Flewelen complained to her of pain in his right foot that was purportedly caused by "kicking a white boy in the head."

Defendant testified that in April of 2009, he was living in bunk No. 6, dormitory No. 307, at CRC in Norco. The state transferred him there from another facility. Defendant had been convicted in 2007 for assault, domestic violence with a deadly weapon, a felony; in April 2009, he was serving his time for that conviction. Defendant had been asked to pass on a message from an inmate outside the dormitory to one inside.

On his way to deliver the message, defendant noticed his bunk neighbor engaged in a disagreement with some White inmates. He was continuing on to deliver the message, when he noticed seven people occupying defensive positions near the showers. As he walked by the entrance to the showers, a White inmate took a swing at him; the inmate hit defendant in the back of the head; nevertheless, defendant continued to move on through the dayroom.

As he arrived approximately two bunks past the shower entrance, another White inmate got in front of him and took a swing at him, but missed. Defendant attempted to reciprocate, but likewise missed. Defendant continued on until he reached his bunk.

Upon reaching his bunk, defendant's White neighbor started swinging at him. Defendant blocked the assaults with his hands; his neighbor then took off. Officer Warren entered the dayroom. He waited for backup and then came to defendant's bunk.

Officer Warren told defendant he saw a guy with braids running around;[4] he searched defendant. Defendant was handcuffed. Defendant testified he never saw Flewelen kicking the victim. Officer Warren testified on rebuttal that he neither spoke with defendant at his bunk nor did he search defendant that day.

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE ON THE COUNT 1 OFFENSE

Defendant contends insufficient evidence supported his conviction for assault by a prisoner, because the People failed to adduce any evidence that he was committed to prison by an order made according to law. We disagree.

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not

[4] The implication here was that defendant had his hair in braids.

warrant a reversal of the judgment."' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Section 4501 provides: "every person confined in a state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony . . . ." Section 4504 provides "[a] person is deemed confined in a 'state prison' if he is confined in any of the prisons and institutions specified in Section 5003 by *order made pursuant to law* . . . regardless of the purpose of such confinement and regardless of the validity of the order directing such confinement, until a judgment of a competent court setting aside such order becomes final." (Italics added.) "All that is required by Section 4500 et seq. is that the prisoner be serving a sentence. The statutes do not require that the conviction and sentence be a valid one. 'If the purpose of the statute is to be achieved, and obviously the purpose is a sound one, it makes no difference why the prisoner has been confined, or that he may be legally entitled to release.' [Citation.]" (*Wells v. People of the State of Calif.* (9th Cir. 1965) 352 F.2d 439, 442.)

The trial court instructed the jury, in pertinent part, with CALCRIM No. 2721, the standard pattern jury instruction for the offense for which defendant stood charged: "The defendant is charged with assault with force likely to produce great bodily injury while serving a state prison sentence. To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant did an act that by its nature would

directly and probably result in the application of force to a person and the force used was likely to produce great bodily injury; [¶] Two, the defendant did that act willfully; [¶] Three, when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] Four, when the defendant acted, he had a present ability to apply force likely to produce great bodily injury to a person; [¶] And, when the defendant acted, he was confined to a California state prison; [¶] And, the defendant did not act in self-defense or in defense of someone else." "A person is confined in a state prison if he or she is confined in the California Rehabilitation Center *by an order made according to law* regardless of both the purpose of the confinement and the validity of the order directing the confinement until a judgment of a competent court setting aside the order becomes final." (CALCRIM No. 2721, italics added.)

Defendant contends the People failed to adduce any evidence as required by the italicized portions of the statute and jury instruction cited above. We disagree. First, defendant himself testified he had been convicted in 2007 for assault, domestic violence with a deadly weapon, a felony for which he was serving time when the incident at issue occurred. Defendant had pled guilty in 2007 to domestic violence felony assault with a deadly weapon. He had been transferred to CRC from another facility. Thus, defendant's own testimony established that his confinement was due to "an order made

according to law," i.e., a conviction.[5] Moreover, Sergeant Roman recognized defendant as an inmate of CRC.

Second, even an evaluation of the evidence prior to the section 1118.1 motion establishes sufficient evidence that defendant was confined by an order made according to law. Officer Warren testified he saw inmates fighting in the dayroom; one of them was defendant. Officer Warren testified he saw defendant stomping on the victim's face; no other inmate was doing so. The only rational inference of the fact defendant was an inmate of CRC was that he had become so "by an order made according to law." Defendant suggests no other reasonable explanation for his status as an inmate of CRC. Thus, substantial evidence supported defendant's conviction on the count 1 offense.

B. CALCRIM NO. 315

Defendant contends the trial court's instruction of the jury with CALCRIM No. 315 infringed on his constitutional rights to due process and a fair trial because it effectively lowered the People's burden of proof by informing the jury that a crime had been committed; thus, limiting the jury's function to determining whether defendant was the perpetrator of that crime. We hold defendant forfeited the issue by failing to object to the instruction below. Nonetheless, addressing the merits of defendant's claim, we hold the instruction legally valid.

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[5] Defendant does not argue on appeal that the trial court erred in denying his section 1118.1 motion, in which case we would be limited to examining the evidence in the record as it existed prior to the motion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213 ["'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' [Citation.]"].)

The court instructed the jury with CALCRIM No. 315, the standard pattern jury instruction on eyewitness credibility, as follows: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether that witness gave truthful and accurate testimony. In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see *the perpetrator*? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description, and how does that description compare to the defendant? [¶] How much time passed between the event and the time that the witness identified the defendant? [¶] Was the witness asked to pick *the perpetrator* out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made the identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in *the crime*? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification?"

Defendant contends the italicized language of the instruction cited above essentially told the jury there was a perpetrator, and that the witness saw the perpetrator. It asks them only to determine how well the witness saw the perpetrator. The instruction furthermore informed the jury that a crime was committed. Thus, according to defendant, the only matter left for determination by the jury was whether the defendant was the one who committed the crime. Therefore, the instruction effectively lowered the prosecution's burden of proof and is per se reversible.

Failure to object below to an instruction correct in the law forfeits the claim on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260; *People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023.) Here, defendant failed to interpose any objection to the instruction. Moreover, to the extent that he is maintaining that only the italicized portions of the instruction above rendered it unconstitutional, he is essentially arguing the instruction should have been modified, not that it is unconstitutional in its entirety. Thus, defendant forfeited the issue by failing to object or request a modification of the instruction below.

Nonetheless, addressing the merits, we hold the instruction an appropriate expression of the law. "'"'In reviewing [a] purportedly erroneous instruction[], 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]" [Citation.] "Additionally, we must assume that jurors are intelligent persons and capable

of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1320-1321.)

CALJIC No. 2.92, the former version of CALCRIM No. 315, contained many provisions similar to those complained of by defendant: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant *as the perpetrator of the crime[s] charged*"; "The opportunity of the witness to observe the alleged criminal act and *the perpetrator of the act*"; "The witness's ability, following the observation, to provide a description of *the perpetrator of the act*"; "The extent to which the defendant either fits or does not fit the description of *the perpetrator* previously given by the witness." Nevertheless, courts have repeatedly upheld the propriety of that instruction.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1144, the court held that "CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]" In *People v. Johnson* (1992) 3 Cal.4th 1183, the appellate court held the trial court's instruction of the jury regarding eyewitness credibility using the term "'perpetrator'" without inserting the adjective "'alleged'" beforehand did not lighten the People's burden in light of its other instructions that in order to render a guilty verdict the jury must find, beyond a reasonable, defendant committed the crime. Indeed, defense counsel himself conceded that the lack of the word "alleged" did not matter, because someone had committed the crime. (*Id*. at p. 1233.) Finally, the court in *People v. Ward* (2005) 36 Cal.4th 186, 213, held there had been no constitutional error in the trial court's instruction of the jury with the standard CALJIC No. 2.92 instruction.

We agree with the above cited precedents that CALCRIM No. 315, like CALJIC No. 2.92, when considered in the context with the other instructions given the jury, did not violate constitutional principles. The court instructed repeatedly and in detail on the reasonable doubt standard. It described, both in general and in stating the elements of the charged crime, that the prosecution bore the burden of proof beyond a reasonable doubt, and that the jury must give the defendant the benefit of any reasonable doubt at every step of the way. (CALCRIM Nos. 103-105, 220, 224, 226, 2721.) Even CALCRIM No. 315 itself, as given, reads: "The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty." To be sure, in our eyes the instruction would be greatly improved by interlineations of "the alleged" before every instance of the words "perpetrator" and "crime"; however, as noted above, defendant did not request any modification of the instruction, which has previously been determined to be a correct extant statement of the law. The instruction as given, when considered in context with all the instructions given, met constitutional muster.

C. *PITCHESS* MOTION

Defendant contends the trial court erred in declining to examine Officer Warren's personnel record upon defendant's *Pitchess* motion. We disagree.

A trial court's ruling on a *Pitchess* motion is based on the trial court's sound discretion and is reviewable for abuse. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) "[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer

accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both '"materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

The defendant does not need to corroborate or show motivation for the alleged officer misconduct, but must provide "'a plausible scenario . . . that might or could have occurred.' [Citation.] A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. [Citation.]" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.)

"[D]efendant need demonstrate only 'a logical link between the *defense* proposed and the pending charge' and describe with some specificity 'how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' [Citation.]" (*People v. Gaines*, *supra*, 16 Cal.4th at p. 182, italics added.) The inquiry does not involve "an assessment or weighing of the persuasive value of the evidence . . . presented [or] which should have been presented. [Citations.] Indeed, a defendant is entitled to discover relevant information under *Pitchess* even in the absence of any judicial determination that the potential defense is credible or persuasive." (*Ibid.*) "If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.]" (*Id.* at p. 179.)

Here, the trial court could reasonably conclude defendant failed to demonstrate sufficient good cause insofar as defendant "did not present a specific factual scenario that is plausible when read in light of the . . . undisputed circumstances." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) Defendant failed to present "an alternate version of the facts." (*Id.* at p. 1318.) Therefore, the trial court acted within its discretion to the extent that it made a "common sense" determination that defendant's version of events was not plausible "based on a reasonable and realistic assessment of the facts and allegations." (*Id*. at p. 1319.)

As we noted in *People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1338, footnote 5, while "Evidence Code section 1043 does not expressly provide that the police report must be attached to the motion . . . our review of the . . . case law, which has been substantial, [revealed] no published case where it was not attached." Here, defendant likewise failed to attach a copy of the police report to his *Pitchess* motion; thus, any scenario he might present by way of declaration would fail to provide an *alternative* to that presented by Officer Warren because Officer Warren's version was not presented. Indeed, the People's opposition noted that "Defendant implies but never overtly states that Officer Warren prepared the report regarding the unnamed victim's injuries, which led to the filing of charges . . . ."

In *Sanderson* we also noted that "[t]o the extent . . . a defendant is required to attach the police report to a *Pitchess* motion, it would appear that the court's taking judicial notice of [the officer's] testimony at the preliminary hearing remedied [the] defendant's failure to do so in this case." (*People v. Sanderson, supra,* 181 Cal.App.4th

at p. 1339, fn. 6.) Here, however, the court did not take judicial notice of Officer Warren's testimony at the preliminary hearing. Defendant did not request the court do so. Rather, defendant submitted the matter on the moving papers, declining even to argue the matter. Thus, we hold that defendant's failure to present Officer Warren's version of events in any form fell short of his duty to present a version with which to contrast his own.

Nevertheless, even assuming that we could unilaterally review Officer Warren's preliminary hearing testimony for something with which to contrast defendant's declaration, we hold that defendant still failed to present an alternative factual scenario that was internally consistent. Officer Warren testified at the preliminary hearing he witnessed defendant stomping on the victim's head numerous times with his foot. In the declaration attached to defendant's *Pitchess* motion, defense counsel averred that "defendant was merely standing next to the victim who had already been injured by other rioters." Nonetheless, defense counsel's declaration also reported the victim received his injuries while coming out of the showers, which were located 30 to 40 feet away from the area where defendant was seen standing next to the victim. Here, defendant never actually denies stomping on the victim's head, i.e., just because others had already injured the victim does not mean defendant did not as well. Moreover, there is no explanation provided for how or why the victim materialized next to defendant, 30 to 40 feet away from the scene of his injury, when Officer Warren observed the pair. Thus, the trial court acted within its discretion in declining to examine Officer Warren's personnel record.

D. PRIOR STRIKE CONVICTION

Defendant contends that because one of the two prior strike convictions alleged by the People was for assault *by means of force likely to produce great bodily injury* (GBI), it did not qualify as a serious or violent felony; therefore, defendant maintains the life sentence imposed based upon two prior strike convictions was unauthorized and must be vacated. The People attempt to transmute defendant's argument from one of the imposition of an unauthorized sentence into one of insufficiency of the evidence. Thus, the People maintain there was substantial evidence to support a true finding that defendant had been previously convicted of assault *with a deadly weapon*, an offense that qualifies as a prior strike conviction. Although we agree with the People that sufficient evidence was adduced below from which the jury could have found an allegation that defendant had been previously convicted for assault *with a deadly weapon*, this does not change the fact that the jury did not render such a finding. Instead, as the verdict form indicates, the jury found only that defendant had sustained a prior conviction for assault *by means of force likely to produce GBI*. Thus, we hold the court's imposition of a 25-years-to-life sentence based upon the two prior strike convictions was error.

The People alleged in their first amended information, filed February 17, 2011, that defendant had suffered a prior strike conviction on October 16, 2007, for assault *by force likely to product GBI*. (§ 245, subd. (a)(1).) At the bifurcated trial on the priors, the People moved into evidence exhibit No. 20, a section 969, subdivision (b) packet containing prima facie evidence of defendant's prior convictions. The packet included a certified copy of the abstract of judgment of defendant's conviction on October 16, 2007,

for *assault with a deadly weapon or instrument*.[6] (§ 245, subd. (a)(1).) The People requested the court take judicial notice of defendant's testimony at the trial on the substantive offense. Defendant had no objection. The court took "judicial notice of the defendant's testimony with respect to the prior convictions." This would include defendant's admission during his testimony that he was serving time at CRC for a conviction incurred in 2007 "for assault on—domestic violence with a deadly weapon." Defendant conceded he had been convicted in 2007 of "domestic violence felony assault with a deadly weapon" pursuant to a plea agreement.

In rebuttal argument, the prosecutor informed the jury that defendant was, "indeed, . . . convicted of assault with a deadly weapon on October 16th, 2007." The court instructed the jury with CALCRIM No. 3100, reading that the People alleged defendant had previously been convicted of "a violation of Penal Code Section 245, subdivision (a), subsection (1), assault with *force likely to produce great bodily injury*." (Italics added.) The jury indicated that it found the allegation true on a verdict form, reading that defendant had been "convicted of the crime of assault *by force likely to produce great bodily injury*, a serious and violent felony, in violation of section 245, subdivision (a), subsection (1), of the Penal Code, within the meaning of Penal Code

[6] The abstract of judgment actually reads "assault w deadly weapon/instr."

section[] 667, subdivisions (c), and (e)(2)(A), and 1137.12, subdivision (c)(2)(A)."[7] (Italics added.)

"Defendant's alleged prior serious felony conviction was for violating section 245(a)(1). That statute makes it a felony offense to 'commit[] an assault upon the person of another with a deadly weapon or instrument other than a firearm *or* by any means of force likely to produce great bodily injury.' [Citation.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) "'[A]ssault with a deadly weapon' is a serious felony. [Citation.] On the other hand, while serious felonies include all those 'in which the defendant *personally inflicts* great bodily injury on any person' [citation], assault merely by *means likely to produce* GBI, without the additional element of personal infliction, is not included in the list of serious felonies. Hence, . . . a conviction under the deadly weapon prong of section 245(a)(1) is a serious felony, but a conviction under the GBI prong is not." (*Ibid*.; § 1192.7, subd. (c)(11).) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." (*Ibid*., fn. omitted.)

"'"'"A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" [Citations.] "The form of a verdict is immaterial provided the intention to convict of the

[7] The latter section does not exist. We assume this is a typographical error, which should read section 1170.12.

crime charged is unmistakably expressed. [Citation.]" [Citation.]' [Citation.] '[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]' [Citations.] '"There are innumerable authorities which declare that the form of the verdict is immaterial if the intention to convict of the crime charged is unmistakably expressed. [Citations.]" [Citations.]'" (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1273, fn. omitted.)

One could argue the form of the jury's finding merely reflected a clerical error. Therefore, in the context of the evidence adduced at trial, the jury intended to render a true finding that defendant had a prior conviction for assault with a deadly weapon. After all, both the abstract of judgment and defendant's own testimony reflected that he had been previously convicted of assault with a deadly weapon. Moreover, the jury's finding reflected that it found defendant had been convicted of a prior serious and violent felony, within the meaning of the "Three Strikes" statutes.

On the other hand, the information, the instructions, and the form of the finding all reflected the jury had only to determine defendant had previously committed an assault *by means of force likely to produce GBI*. Thus, it is not at all clear or unmistakable that the jury intended to render a finding that defendant suffered a prior conviction for assault *with a deadly weapon*. Indeed, the defect in the jury finding form was not technical, but substantive. Therefore, because the jury did not render a true finding that defendant had previously been convicted of assault *with a deadly weapon*, the court's imposition of a

25-years-to-life indeterminate term based, in part, on that prior strike allegation, was unauthorized.

E. SECTION 667.5, SUBDIVISION (B) PRIOR PRISON TERMS

"Section 667.5, subdivision (b), "provides for an enhancement of the prison term for a new offense of one year for each 'prior separate prison term served for any felony.'" (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) When prior prison terms are proven, "the court must either impose the prior prison enhancements or strike them. [Citation.]" (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) "By the terms of section 667.5, subdivision (g), one continuous completed period of incarceration amounts to one separate prison term, whether 'imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes.' [Citation.]" (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1151.) Thus, it is error for a court to impose sentence pursuant to section 667.5, subdivision (b) on two separate prior convictions if the defendant served only one concurrent sentence for both. (*People v. Jones* (1998) 63 Cal.App.4th 744, 747; *People v. Riel* (2000) 22 Cal.4th 1153, 1203.) Where a trial court has done so, we must strike one of the sentences. (*Riel*, at p. 1203.)

Here, the jury found true all three alleged prior prison term allegations. However, the People adduced insufficient evidence below that defendant served separate sentences for two of his prior convictions. The abstract of judgment for defendant's conviction for possession of a firearm by a felon on January 7, 1991, reflects the court imposed a two-year sentence. The abstract of judgment for defendant's prior conviction for second degree robbery on December 24, 1990, reflects imposition of a 10-year sentence that was

imposed *concurrently* to that imposed for firearm offense. Thus, as conceded by the People, the evidence is insufficient to support a separate one-year sentence. Therefore, we will strike the one-year consecutive term of imprisonment imposed for the robbery conviction.

DISPOSITION

The 25-years-to-life sentence imposed based upon the true finding on both prior strike allegations is reversed. The matter is remanded for further proceedings in the trial court in accordance with this opinion. Additionally, we strike the lower court's imposition of a third, one-year sentence pursuant to section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.